U.S. Department of Labor

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Issue Date: 17 August 2007

CASE NO.: 2007-LHC-174

OWCP NO.: 07-171013

IN THE MATTER OF

M.A.[1],
Claimant,
v.

NORTHROP GRUMMAN,
Employer

APPEARANCES:

GREGORY S. UNGER, ESQ.
On behalf of Claimant

RICHARD S. VALE, ESQ.
On behalf of Employer

BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq., (The Act), brought by Claimant against Northrop Grumman, (Employer). The formal hearing was conducted in

[1] Pursuant to a policy decision of the Department of Labor, the Claimant's initials rather than full name are used to limit the impact of the Internet posting of agency adjudicatory decisions for benefit claim programs.

Covington, Louisiana on June 7, 2006. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.[2] The following exhibits were received into evidence: Joint Exhibit 1 and 2, and Employer's Exhibits 1-15. Claimant adopted Employers' Exhibits. This decision is based on the entire record.[3]

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. The date of injury/accident is June 23, 2004.
2. The injury occurred in the course and scope of employment.
3. An employer/employee relationship existed at the time of the injury/accident.
4. Employer was advised of the injury on June 23, 2004.
5. Notice of Controversion was filed November 16, 2004, July 13, 2006, July 25, 2006 and August 14, 2006.
6. An informal conference was held August 8, 2006.
7. Nature and extent of disability:
   (a) Temporary total disability from August 20, 2004 to July 13, 2006.[4]
   (b) LWEC benefits paid from July 28, 2006 to present and ongoing.
   (c) Total benefits paid: $54,942.68.
8. Permanent disability: Claimant has permanent restriction per Dr. Grimm.
9. Medical benefits totaling $13,271.24 to date have been paid.
10. Average weekly wage at the time of injury was $673.85.

[2] Both parties submitted timely briefs.

[3] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr __"; Joint Exhibit- "JX __"; Employer's Exhibit- "EX __"; and Claimant's Exhibit- "CX __".

[4] At the hearing Claimant stated she was satisfied with the compensation paid until July 21, 2006. She is not asking for additional compensation prior to this date. Although there is some discrepancy among the dates listed on JX-1, it appears that on July 28, 2006 Claimant received a check that covered retroactively up until July 20, 2006. Thus, the compensation owed Claimant is in dispute beginning on July 21, 2006.

Issues

The unresolved issues in this proceeding are:

1. Choice of physician.
2. Whether or not Claimant's reduction in benefits on July 28, 2006 was justified.
3. Nature and extent of disability.
4. Whether or not Claimant has reached MMI.
5. If the payment of LWEC was appropriate, what is Claimant's correct post-accident earning capacity?
6. Attorney's fees and costs.

Statement of the Evidence

Claimant

Claimant is 50 years old and has resided in Avondale, Louisiana for thirty years. She is single with two children. After completing the tenth grade Claimant went to work. Her first job was at Loop Linen working on an assembly line. Following this job, Claimant went to work for Employer. Her first position was with the clean-up crew. She worked this position for some time and was eventually transferred to the pipe department where she received training in pipefitting and tacking. After working about three years as a pipe-fitter, Claimant was laid off. She then went to work for Bay Offshore and eventually Brown & Root where she continued to work as a pipe-fitter. Claimant also worked at a coffee place in Harahan and at Imperial Trading on the assembly line, as well as a painter at the Windsor Hotel in New Orleans. She has never worked in an office setting.

Claimant next returned to work for Employer and became a rod processor in the tool room. She had not had any accidents or injuries prior to the June 2004 accident while working for Employer. On June 23, 2004, Claimant fell while trying to open a window in the tool room. She stated she pulled a muscle and heard something crack when she fell. Claimant was taken to first aid, given ice and some pills and then sent to the respirator shop to finish out the day. Claimant, however, could not carry out the duties normally required at the respirator shop. That night after returning home, Claimant was still hurting and went to West

Jefferson hospital where she was examined and given a shot.[5] She also was asked to take a drug test. Claimant returned to work, bringing with her the papers from her hospital visit, and was again placed in the respirator shop.

When she returned to work, Claimant spoke with an individual from First Aid who filled out an accident report and then showed Claimant a list of doctors and their specialties. According to Claimant, this individual from First Aid told her Dr. Grimm was a good doctor and made an appointment for Claimant to see Dr. Grimm. This individual did not tell Claimant she had the right to choose her own doctor. Nor did he give her any paperwork to sign saying that she was picking Dr. Grimm as her physician. Claimant had no prior knowledge of Dr. Grimm and had never seen an orthopedic surgeon before.

At her first appointment at Dr. Grimm's office, Claimant was initially seen by Dr. Grimm's nurse. Claimant told the nurse that Claimant's shoulder, neck, and lower back were hurting. The nurse took this information down. Claimant also stated she told Dr. Grimm that her neck, shoulder, and lower back were bothering her. Dr. Grimm gave Claimant medication; as Claimant testified, "he kept [her] doped up." (Tr. pp. 26) He also ordered therapy for her and performed some test in which needles were put in Claimant. Claimant also believed she had an MRI of her shoulders.

Claimant continued to see Dr. Grimm for almost two years without getting any relief.[6] During this period, Claimant continued to make complaints to Dr. Grimm and his staff, including complaints about her lower back. She told him that she was having "this shocking at the bottom of [her] lower back." (Tr. pp. 28) Claimant was next referred to EX-2, which contained Claimant's handwritten note from her first visit with Dr. Grimm which noted "Back pain and shoulder pain." The questionnaire asked where the problem was located, and Claimant wrote, "Be low back." (EX-2) When Claimant asked Dr. Grimm about her low back, he responded that all she could do was use a heating pad and it would wear off. (Tr. pp. 30) He continued to give Claimant pain medication. Claimant stated she asked Dr. Grimm, on two occasions about seeing another doctor and he told her that

[5] On June 23, 2004, Claimant presented to the ER complaining of chest pain.

[6] Because Dr. Grimm had placed Claimant on light duty, Employer kept her working in the respirator room until August 19, 2004, at which point Claimant was put on worker's compensation.

another doctor would tell her the same thing.[7] Claimant stated, she also spoke to the adjuster, Ryan Downs, at Avondale about wanting to see another doctor and was told that Dr. Grimm was her doctor. Dr. Grimm did, however, send her to a different doctor to get a nerve test performed.

Claimant explained that she eventually filed a claim for compensation with the Department of Labor, after being told that this was an option by a co-worker. Claimant was subsequently sent a claim form to fill out, which she identified as EX-12. Claimant stated that no one at the Labor Board told her she could use a physician of her choice.

She continued to treat with Dr. Grimm, completed a functional capacity evaluation and was eventually released to light duty. Claimant was still having low back pain and eventually retained counsel. However, prior to retaining counsel, Mike Nebe, a vocational rehabilitation counselor hired by Employer, came to Claimant's house and asked her questions about her medical treatment and job options. Claimant explained that he tried to administer a test, but she told him she could not complete it because she had taken medication. She only met with Mr. Nebe on this one occasion. Claimant never received any correspondence from Mr. Nebe or from anyone else at FARA. She did receive a list of jobs (found by Mr. Nebe) from her attorney and applied for them. Mr. Nebe had identified three jobs available as of June 9-13, 2006, which included a job at the Convention Center, a Causeway Bridge Safety Monitor, and a parking attendant for the Holiday Inn. (EX-1) On July 29, 2006, Claimant applied for the jobs at the Convention Center (where she spoke to an individual named John Boyd) and at Holiday Inn, where she had an interview with an individual named Sarah Stuckey. She also applied at the Causeway Commission, but never heard back from them.

Mr. Nebe had also previously identified three jobs, a parking booth attendant, cashier at Tropic Car Wash, and optometric assistant, that were available in April and May 2005. (EX-1) On June 29, 2006, Claimant also applied for the parking booth attendant job and for the cashier job at Tropic Car Wash, but was unsuccessful.

[7] However, she acknowledged on cross-examination that Dr. Grimm did not tell her she could not see another doctor. Claimant stated she did not get another doctor because "[she] didn't know no other doctors." "I was new up in this; I didn't know what was going on." (Tr. pp. 58)

Claimant's attorney referred her to JX-2, which contains a list of handwritten notes kept by Claimant describing her job search efforts. Besides the jobs identified by Mr. Nebe, Claimant conducted an independent job search.

In March 2007, Claimant put in an application for an optometric assistant at Eye Masters, called a Veterinary clinic in Metairie and discussed the details of a receptionist job, contacted New Orleans Private Patrol and was told she needed a year of experience and a high school diploma, called Oasis Motel and was told the position was filled, called Winn-Dixie about a cashier job, but it had been filled, called State Oil Fuel Center and was again told the position had been filled, and went to the Dollar General Store to inquire about a job.

On April 3, 2007, Claimant applied for a clerk position at Charity Hospital, where she spoke with Connie. While applying for the clerk position, Claimant inquired about a tech position, but was told she had to have experience and a high school diploma. On April 5, 2007, Claimant applied at Chef Parnell Catering for a receptionist position, where she was granted an interview, but did not receive a call back. This same day Claimant also applied for a telephone operator position at Central Home Health Care. On April 10, 2007, Claimant called Colonial Living Center about a job, but was told they were looking for individuals with experience. She also applied at Jacquet Construction for a dispatcher job and is still waiting to hear back from them. On April 12, 2007, Claimant called Hurwitz-Mintz about a sales job, but was told she needed experience. She also called about a sales job on Veteran's Boulevard, but did not fill out an application. On April 17, 2007, Claimant returned to Charity Hospital to inquire about a dispatcher job. She did not fill out another application because the hospital already had her on file. She also filled out an application at Ace Payday Loan for a desk clerk position. On April 19, 2007, Claimant contacted Ray Brandt Dodge about a desk clerk job, but the position had already been filled. Claimant also inquired at Home Depot about a position she had seen in the newspaper; however, that position had been filled and Home Depot told her another position, PBX operator, was opening. Claimant next went to Harrah's Casino on April 24, 2007 and filled out an application, but was told she needed to have a high school diploma. She also went to Boom Town Casino and was told the same thing. On April 26, 2007, Claimant contacted the Hilton Hotel about a clerk position but was told she would need experience and a high school diploma. Claimant also called Universal Furniture about a job.

A few days prior to the hearing Claimant again looked for a job. She filled out an application at the Dollar Tree in Boutte, and was still waiting to hear back. However, this job required lifting (possibly 50 pounds) because Claimant would

have to unload the trucks. Claimant went to Temps Today and found three jobs listed on a bulletin; however, they required hard, physical work. She also filled out an application for a clerk position at a hotel in Avondale.

Claimant was not offered a job at any of these potential employers and, as of the time of trial, was still waiting to hear from some of them. Some of the applications asked whether Claimant had any previous on-the-job injuries, and Claimant disclosed her work injury.

Claimant did not have any prior problems with her neck, shoulder or back before the 2004 work accident. Claimant testified she currently feels a "shocking" in her back and a pain running all the way down her lower back. She can not drive long distances because she swells up and has pain in the neck and shoulders. Claimant stated she would like to see another doctor to check out the problem in her lower back.

On cross-examination Claimant stated she received some training in rod room processing as well as a certificate in rod processing. Claimant had to keep an inventory of the tools in the rod room processing room. At one point Claimant worked as a lead person, which required her to direct and check the work of those below her. Claimant also had begun training to be certified in pipe-fitting, but did not receive a certificate. Claimant can read and write and make change.

Following her accident Claimant continued to work in the respirator room until August 19, 2004. Claimant has not worked since.

With regard to choice of physician, Claimant was shown EX-12, pp. 3, which was dated June 28, 2004. Claimant acknowledged she had marked "yes" next to the box which read "Were you treated by a physician of your choice?" However, Claimant stated she did not understand what that form meant at the time she signed it.

Ryan Downs

Mr. Downs is the FARA adjuster assigned to Claimant's case. He was allowed to testify at the hearing for impeachment purposes. Mr. Downs stated he spoke with Claimant around January 2006 regarding a missed compensation check. Due to hurricane Katrina, a number of Claimant's were not receiving timely checks. Mr. Downs specifically remembered Claimant because she was one of the only Claimants missing two checks. He testified he did not recall any

conversations with Claimant wherein she advised him she wanted to see another doctor.

Michael Nebe

Mr. Nebe, a vocational rehabilitation counselor hired by Employer, was stipulated and accepted as an expert in the field of vocational rehabilitation counseling. He met with and interviewed Claimant in June 2006. He spoke with her regarding her educational background, which he explained is a critical element of his job search for any Claimant. Contrary to her testimony in Court, Mr. Nebe stated Claimant told him she had received a high school diploma. He asked her to take a reading and arithmetic test, but she said she was not feeling well and would not be able to focus. Mr. Nebe told her he felt comfortable foregoing the test since she had a high school diploma and the jobs she could perform would probably be entry level. Mr. Nebe further testified that during the interview, Claimant appeared alert and communicated well. At this interview Claimant also told Mr. Nebe she had only previously worked for Employer, yet in court, she testified she had worked other jobs.

In reliance on the June 2006 interview, Claimant's work experience and education, geographical location and Dr. Grimm's restrictions by report dated June 13, 2006, Mr. Nebe identified three jobs available as of the time of the report, as well as three jobs that he believed were available as of April or May 2005, around the time Dr. Grimm returned Claimant to work.[8] Subsequently, and without again seeing Claimant, Mr. Nebe issued a second report and job survey dated May 10, 2007. Both reports are found at EX-1. This report also identified three jobs that were currently hiring or accepting applications at the time: parking garage attendant at the Hilton Hotel, Desk Clerk at Oasis Motel, and PBX Operator at Harrah's casino.[9]

Using JX-2, Mr. Nebe testified that he had inquired about all 25 jobs Claimant stated she had applied for. Eleven employers did not respond and of the 14 who did, only two recalled Claimant. Otherwise, they found no applications on

[8] Mr. Nebe personally contacted the employers he listed on his 2006 labor market survey (LMS). However, he did not contact the employers who had jobs available in 2005 as these jobs were found in order to make the LMS retroactive. These jobs were found on a job bank as well as on other LMS that Mr. Nebe had previously prepared.

[9] Claimant testified that she applied to these three jobs in April 2007.

file or stated that no such "contact" person[10] had ever been employed with them before. Mr. Nebe contacted these employers in May 2007 and Claimant testified she had applied in March or April 2007. Most of these employers told Mr. Nebe they would at least keep applications on file for three to six months.

Mr. Nebe specifically noted a number of discrepancies between Claimant's testimony regarding her job search and information he obtained from his attempts to verify Claimant's job search. First he noted that Claimant testified she went to Eye Masters and applied in person; she listed Eye Masters on her job search papers (JX-2) and wrote the address as West-bank expressway. However, when Mr. Nebe contacted them, he was told that Eye Masters had moved from the West-bank expressway location following hurricane Katrina. Mr. Nebe further stated that although Claimant indicated she contacted the Oasis Motel on March 20, 2007 and was told they were not hiring, he contacted them May 8, 2007 and was told the position was still available.

Mr. Nebe acknowledged that wages since hurricane Katrina may have gone up, but he did not have any evidence as to what the jobs identified would have paid as of the time of Claimant's accident.

Medical Evidence

Deposition of Dr. Matthew R. Grimm, EX-3

Dr. Grimm testified by deposition on May 16, 2007. He stated Claimant was referred to him by Dr. Corcoran, the first aid doctor at Employers; however, he acknowledged that he only had a notation to this effect from his notes and no other evidence that it was actually a referral.[11] He first examined Claimant on June 28, 2004 for complaints of pain in her upper back and left shoulder. He performed an orthopedic exam on her, but did not remember if he examined her low back. He detected muscle spasms in the upper back and prescribed medication. Regarding work restrictions, he put Claimant on light duty with lifting restrictions of 10 pounds and no climbing ladders.

[10] Claimant listed different "contact" people (individuals she had spoken with at each of the employers) next to most of the jobs contained in JX-2.

[11] In the past he has received referrals from Dr. Corcoran for patients who were injured at Avondale.

Claimant had a follow-up visit on July 9, 2004 at which point Dr. Grimm prescribed physical therapy. She returned on July 23, 2004 still in pain and complaining of numbness in her hand. Dr. Grimm recommended that she continue with the physical therapy. Claimant was seen again on August 13, 2004[12] at which point Dr. Grimm increased her lifting restriction to 15 pounds and on September 3, 2004 he injected a trigger point in her upper back to help relieve her pain. At both of these visits Claimant continued to complain of pain similar to her first visit. During this period of time Dr. Grimm also ordered a cervical MRI, which showed normal degenerative changes. He discussed these results with her on October 5, 2004. At this visit Dr. Grimm notes that Claimant was complaining of pain in her lower back. He examined her lower back and did not find any spasms. Dr. Grimm did not order any diagnostic tests for her low back at this point. He also again increased her lifting restrictions to 20 pounds.

Claimant returned to Dr. Grimm on October 26, 2004 still in pain; however, at this visit, Dr. Grimm did not note any complaints of low back pain. He increased her lifting restrictions to 25 pounds. On November 29, 2004, Claimant remained pretty much the same as she had throughout Dr. Grimm's treatment of her, and he believed she had reached Maximum Medical Improvement (MMI). [13] He ordered an FCE and kept her work restrictions as light duty with lifting restrictions of 25 pounds, pending the results of the FCE. Dr. Grimm did not, however, discharge Claimant from his care. He actually referred her to Dr. Puente, a neurologist, to evaluate her complaints of numbness. She returned to Dr. Grimm on December 14, 2004 without any improvement. At this point, Dr. Grimm still believed Claimant was at MMI.

Dr. Grimm did not see Claimant again until April 11, 2005. Dr. Grimm reviewed the FCE[14] and opined he did not think Claimant put forth her full effort in the test, and therefore, he found the FCE non-diagnostic. At this point he returned Claimant to work for a trial and told her she could limit her lifting as needed. He still felt she was at MMI.

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[12] Although Dr. Grimm did not note any complaints of low back pain at this office visit, the handwritten notes taken by his staff state, "Follow-up left shoulder, back still hurts, new PT started yesterday, left arm not able to use to lift." There was no indication of whether Claimant was referring to upper, middle or lower back.

[13] Although Dr. Grimm did not mention any complaints of low back pain in his deposition, in a November 29, 2004 letter to FARA, Dr. Grimm noted that claimant "says occasionally she has radiation into her lumbar spine." (EX-2, pp. 16)

[14] The FCE placed Claimant at either sedentary duty or light duty with a 10 pound lifting restriction; however, the report noted Claimant exhibited signs of symptom exaggeration.

On May 9, 2005 Dr. Grimm again saw Claimant, who had the same complaints of pain. He did not note any complaints of low back pain. At this visit Dr. Grimm was concerned that Claimant may have had a rotator cuff disorder and injected her shoulder to try and diagnose it. Dr. Grimm outlined specific work restrictions at this visit, reducing her lifting restrictions to 10 pounds because he felt that there may have been a new diagnosis of shoulder bursitis. Claimant returned on June 2, 2005 still complaining of shoulder pain, this time in both shoulders. Dr. Grimm still believed Claimant was at MMI and gave her light duty work restrictions with limited overhead activity of 15 pounds. Dr. Grimm also noted that Claimant had skin sensitivity which indicated to him that her subjective complaints were out of proportion to his objective findings.

Dr. Grimm next saw Claimant on June 22, 2005. She was still complaining of pain in both shoulders. He did not perform any diagnostic tests to investigate the pain that was now in right shoulder. He again noted signs that Claimant's subjective complaints were out of proportion to his objective findings and he increased her lifting restrictions to 20 pounds. In June 2005, Dr. Grimm responded to a questionnaire from FARA regarding Claimant's work restrictions. He placed Claimant at MMI on April 11, 2005 with permanent work restrictions for the FCE of 20-25 pounds lifting intermittently; intermittent overhead activities; no walking restrictions; stairs, ladders okay.

On July 13, 2005, Claimant was not doing any better; she had complaints of pain in both shoulders and her lower back. Dr. Grimm noted Claimant said her pain was radiating or referring into her lower back from her upper back. Dr. Grimm ordered x-rays of Claimant's low back, which came back normal. At this point, he recommended Claimant do activities as she felt comfortable. He gave her some anti-inflammatory medication to help ease her inflammation.

On August 12, 2005, Claimant was again examined by Dr. Grimm. She had not really improved and had new complaints of pain radiating up to her scalp and headaches. He did not note any complaints of lower back pain at this time. He still believed Claimant was at MMI. His only work restriction was a 20 pound lifting restriction. Dr. Grimm testified that Claimant returned for follow-up visits on October 7, 2005 and November 4, 2005 with continual complaints of pain, but no lower back pain noted.

On January 6, 2006, Claimant returned complaining of pain in her shoulder and back (the back pain being activity related). Dr. Grimm advised Claimant to do

what she felt comfortable doing and kept her restrictions at 20-25 lifting limitation. He did not request any diagnostic tests. On March 7, 2006, Claimant stated she was having occasional lower back pain as well as her usual upper back pain. Her next visit was on May 6, 2006, at which point Claimant notified Dr. Grimm she had gone to the Emergency room for left-sided neck and left-sided shoulder pain. She told Dr. Grimm that she was doing some work around the house when she had increasing pain radiating down the arm. Claimant did not complain of low back pain at this May 6, 2006 visit with Dr. Grimm. Dr. Grimm recommended a trial of epidural steroid injections for Claimant's cervical spine.

June 2, 2006 was the last visit Dr. Grimm had with Claimant. Her radicular arm pain seemed to have improved although she was still having left shoulder pain. Dr. Grimm did not note any complaints of pain in her lower back at this visit. Dr. Grimm discharged Claimant from his care at this point. He felt she did not need further treatment as she was having the same intermittent symptoms as she had previously and she had been trained in a home exercise program by the physical therapist. Claimant could still return to Dr. Grimm as needed.

Dr. Grimm had no independent recollection of any conversations with Claimant where she requested to be referred to a different doctor. Nor did he recall Claimant ever complaining of his treatment of her. He stated that if any patient asks for a referral to another doctor, he would never deny the request. He noted that the patient can see whomever they want.

Dr. Grimm was asked to review Mr. Nebe's vocational rehabilitation report; he opined that the jobs listed on both the June 13, 2006 report and the jobs listed on the May 10, 2007 report fit Claimant's capabilities and work restrictions as he found them in June 2006.

On cross-examination, Dr. Grimm reaffirmed that he felt his restrictions (of no overhead lifting in excess of 20-25 pounds) were reasonable even though there was an inconsistent FCE. He also acknowledged that when Claimant first came to his office she filled out a form indicating her complaints. On that form Claimant listed job injuries, back pain and shoulder and neck pain. When asked where the pain was located, she indicated "below back." Dr. Grimm agreed that that seemed to indicate Claimant was complaining of pain in the low back.

However, Dr. Grimm stated that Claimant did not indicate to him that her low back (what he considered to be her lumbar sacral junctions) was having pain; she did indicate that her "back" was hurting further up near the thoracic lumbar

junction (which is more middle back, T12-L1). Dr. Grimm testified that Claimant did not point to her lower lumbar spine, but pointed to the lower thoracic spine/upper lumbar spine area. Dr. Grimm did acknowledge that on November 29, 2004, in a letter to FARA, he noted Claimant's complaints of pain radiating into her lumbar spine. He believed that was due to muscle spasms in her thoracic spine. He also noted that the handwritten notes from this date indicated Claimant was having numbness in her lower back and arm. He did not order any tests or do any evaluation of her lower back at this point. He did not think it was warranted.

On December 14, 2004, someone from Dr. Grimm's staff filled out a work description form which listed LBP (low back pain) under the description of injury. Another status report, although not in Dr. Grimm's handwriting, on May 2, 2006 listed LBP under description of injury also. On June 22, 2005, however, a work status report in Dr. Grimm's handwriting lists low back pain and cervical thoracic pain as the diagnosis. Dr. Grimm testified this was the first time he was aware that she had pain in her lower lumbar spine. On July 13, 2005, Dr. Grimm took x-rays of Claimant's lumbar spine, which were normal. However, he acknowledged that x-rays would not show all of the possible reasons for numbness in her lumbar spine. Dr. Grimm opined that Claimant had spasms in her lower back resulting from her thoracic spine injury which was related to her injury at work.[15]

On redirect Dr. Grimm stated that in some cases x-rays, physical examinations, and orthopedic examinations are sufficient to determine pathologies or abnormalities. He did not find any abnormalities of Claimant's lumbar spine.

EX-4, pp. 9, Avondale Medical Records

On June 27, 2004 Claimant presented to the emergency room at West Jefferson Medical Center complaining of pain to the lower back.

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in

[15] However, on re-cross it seems that Dr. Grimm contradicts this statement by saying her spasms in her "upper" lumbar spine were caused by her thoracic injury.

Director, OWCP v. Greenwich Collieries (Maher Terminals), 512 U.S. 267, 28 BRBS 43 (1994), that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the Claimant when the evidence is balanced, violates Section 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (1994).

Choice of Physician

Section 7(b) of the Act entitles a Claimant to her free choice of physician. Claimant argues that Dr. Grimm was not her choice of physician, but rather she was referred to him by Employer. Employer asserts that Claimant endorsed Dr. Grimm as her choice of physician when she checked "yes" on the 203 form indicating she was treated by a physician of her choice. Employer further argues that because Claimant treated with Dr. Grimm for approximately two years, he has become her choice of physician regardless of whether or not a formal choice of physician form was filled out. In the alternative, Claimant argues that in the event I find Dr. Grim to be her choice of physician, she should still be allowed to see a different doctor to treat her low back problem which, she alleges, Dr. Grimm did not address.

I accept Claimant's testimony that she did not understand she was entitled to choose a physician of her choice and did not sign a choice of physician form.[16] However, given the fact that she continued to treat with Dr. Grimm for approximately two years and did not assert that he was not her choice of physician until after he returned her to work and discharged her from his care, I find Claimant acquiesced to Dr. Grimm as her choice of physician. Claimant saw Dr. Grimm regularly during this two year time period, received a number of injections, had x-rays and an MRI performed, received a referral to a neurologist, and was prescribed physical therapy. While she stated she inquired to Dr. Grimm and Ryan Downs, the FARA adjuster, about seeing a different doctor, this testimony was rebutted by Dr. Grimm in his deposition and Mr. Downs at the hearing. Dr. Grimm stated that while he did not have any recollection of whether or not

[16] I also do not give weight to the 203 form on which she checked "yes" indicating she was treating with a physician of her choice as Claimant was unfamiliar with worker's compensation and testified she did not know what the form meant.

Claimant asked him for a referral to another doctor, he explained that if she had, he would have given her one. He stated that he would never deny a request for a referral. Mr. Downs testified that he did specifically remember Claimant and did not recall her requesting a different physician. Therefore, I find Dr. Grimm to be Claimant's physician of choice.

However, I also find that Dr. Grimm did not address Claimant's complaints of low back pain and thus, Claimant is entitled to see another doctor. It is evidenced on the initial paperwork completed by Claimant at her first appointment with Dr. Grimm that she listed low back pain as one of her complaints. Although Dr. Grimm did not feel Claimant indicated low back to him during the course of their dialogue, he acknowledged that according to the paperwork, low back pain was one of Claimant's complaints. This is further supported by EX-4, pp. 9, which contains medical records from an emergency room visit on June 27, 2004 where Claimant was complaining of low back pain.

It seems apparent that Claimant had low back pain almost immediately following her accident at work and made Dr. Grimm's staff aware of this problem[17], however, for whatever reason, Dr. Grimm did not understand this to be one of Claimant's chief complaints. It was not until October 5, 2004 that Dr. Grimm notes Claimant was complaining of pain in her lower back. Dr. Grimm examined her lower back and did not make any objective findings; he did not order any diagnostic tests at this time. In fact, Dr. Grimm increased Claimant's lifting restrictions at this visit. On April 11, 2005 Dr. Grimm placed Claimant at MMI with permanent work restrictions limiting her lifting to 20-25 pounds intermittently, intermittent overhead activities; no walking restrictions; stairs and ladders okay. However, he continued to treat Claimant and on July 13, 2005, due to Claimant's complaints of low back pain, he ordered x-rays of her lower back, which he found to be normal. However, in his deposition Dr. Grimm acknowledged that x-rays do not show all of the possible causes for low back pain. Dr. Grimm continued to treat Claimant until June 2006, but did not provide any further treatment for her low back pain. He stated in his deposition that he understood Claimant's complaint to be her middle back.

While it appears that Dr. Grimm did not understand Claimant's low back pain to be her chief complaint, there is sufficient evidence in the record, from Dr. Grimm's records and the emergency room records, to indicate that it was a

[17] At least two status reports from Dr. Grimm's office listed LBP (low back pain) under the description of injury.

problem and that Claimant complained about it following her accident. Although Dr. Grimm took x-rays, he provided no other treatment for her lower back, and even acknowledged in his deposition that he thought Claimant was complaining about pain to her middle back. Therefore, I find that Dr. Grimm did not address Claimant's complaints of low back pain and therefore, she is entitled to see a different doctor of her choice to evaluate these complaints.

Nature and Extent

In this instance, Claimant testified that on June 23, 2004 she injured herself while trying to open a window in the tool room. Employer was advised of the injury that same day. Both Employer's counsel and Claimant's counsel have stipulated that Claimant was injured on June 23, 2004 in the course and scope of employment and that the injury was reported the same day. (JX 1)

Based on the facts and the parties' stipulations I find that Claimant was injured in the course and scope of employment on June 23, 2004. Having established an injury, the burden now rests with Claimant to prove the nature and extent of her disability. *Trask v. Lockheed Shipbuilding Constr. Co.*, 17 BRBS 56, 59 (1985). A Claimant's disability is permanent in nature if she has any residual disability after reaching maximum medical improvement (MMI). *Id.* at 60. Any disability before reaching MMI would thus be temporary in nature.

The date of MMI is defined as the date on which the employee has received the maximum benefit of medical treatment such that her condition will not improve. The date on which a Claimant's condition has become permanent is primarily a medical determination. *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *La. Ins. Guaranty Ass'n v. Abott*, 40 F.3d 122, 29 BRBS 22 (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. Gen. Dynamics Corp.*, 10 BRBS 915 (1979).

In this instance the parties dispute whether Claimant has reached MMI. Employer argues that, per Dr. Grimm, Claimant reached MMI on April 11, 2005. Claimant, however, contends that she is not at MMI because she has not had her complaints of low back pain evaluated.

Given that no other medical opinion was presented besides Dr. Grimm's, and considering he provided extensive treatment for Claimant's shoulder and neck

complaints and, although returned her to work, still limited her work capabilities to what could essentially be considered light duty, I find Claimant to have reached MMI as of April 11, 2005. However, I note that this is subject to an evaluation and opinion by a physician of Claimant's low back pain.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A Claimant who shows she is unable to return to her former employment due to her work related injury establishes a *prima facie* case of disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 420, 24 BRBS 116 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a Claimant who establishes an inability to return to her usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. Gen. dynamics Corp.*, 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co.*, 17 BRBS 24 (1985). Issues relating to nature and extent do not benefit from the Section 20(a) presumption. The burden is upon Claimant to demonstrate continuing disability, whether temporary or permanent, as a result of his accident.

In the present case, there is no dispute that Claimant cannot return to her previous job for Employer. Dr. Grimm, although returning Claimant to work, placed permanent lifting restrictions on her limiting her lifting to 20-25 pounds and allowing only intermittent overhead reaching. Furthermore, an FCE was performed that indicated Claimant could perform light duty work with restrictions or sedentary work. Her specific floor lift capability was 10 pounds.[18] Therefore, Claimant has established a *prima facie* case of disability and the burden shifts to Employer to show the existence of suitable alternative employment.

To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the claimant's geographical area which he is capable of performing, considering her age, education, work experience and physical restrictions, for which the claimant is able

[18] However, it should be noted that the FCE examiner stated Claimant exhibited signs of symptom/disability exaggeration behavior and, according to her validity criteria, showed signs of very poor effort.

to compete and could likely secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981).

Turner does not require that the employer find specific jobs for the claimant or act as an employment agency for the claimant; rather, the employer may simply demonstrate the availability of general job openings in certain fields in the surrounding community. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 431 (5th Cir. 1991); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 1044 (5th Cir. 1992). However, for job opportunities to be realistic, the employer must establish the precise nature and terms of job opportunities which it contends constitute suitable alternative employment. *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. *Villasenor v. Marine Maint. Indus., Inc.*, 17 BRBS 99, 103 (1985). Once the employer demonstrates the existence of suitable alternative employment, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. *P & M Crane Co.*, 930 F.2d at 430.

In this case, Employer's vocational rehabilitation counselor, Mr. Nebe, conducted a LMS identifying three jobs available as of June 13, 2006 as well as three jobs available as of April of May 2005, around the time Claimant reached MMI. I do not find the jobs identified as of April or May 2005 to be suitable alternative employment as Mr. Nebe found these jobs on a job bank in an effort to make his labor market survey retro-active. He did not personally contact these employers to determine the terms and conditions of the jobs.

I do, however, find that Employer established suitable alternative employment per Mr. Nebe's June 13, 2006 report on which he identified three jobs that met Claimant's criteria. Mr. Nebe's report stated he considered Claimant's restrictions and capabilities in identifying these jobs. These jobs were also reviewed by Dr. Grimm, during his deposition, and deemed acceptable employment considering Claimant's physical restrictions. Two of these jobs paid $8.00 an hour and one paid $8.92 an hour. Two of the jobs were full-time (40 hours a week) and one was listed as 20-40 hours per week, depending on experience.

Claimant did not present any evidence indicating that she could not perform these jobs; however, she contends that she tried with reasonable diligence to secure employment, with the jobs identified by Mr. Nebe and through her own independent job search and was unsuccessful. I disagree. Although Claimant did present evidence of a job search, JX-2, and testified that she contacted approximately 25 employers yet was unable to obtain employment, I do not find Claimant to have shown due diligence in her job search. While Claimant stated that she did "contact" all of these employers, she acknowledged that she did not submit applications at all of these jobs. Apparently, she was told by a number of these potential employers that the jobs were not longer available. Calling these employers and being told that the job is no longer available does not in itself constitute due diligence. Furthermore, Mr. Nebe followed-up on all 25 jobs listed by Claimant and of the fourteen that he was able to contact, only two remembered Claimant or had applications on file. The other twelve either had no applications on file or stated that no such "contact" person, as listed by Claimant on JX-2, worked for them. Claimant's efforts are also suspect considering Mr. Nebe's testimony that when he contacted Eye Masters he was told they had moved locations following hurricane Katrina and were no longer located on the West-Bank Expressway. However, Claimant testified that she went in person and applied and on her job search papers, JX-2, listed the address at the old West-Bank Expressway. Even assuming Claimant did contact all of the employers listed, by her own admission, she called most of them and did not fill out applications or go in person to inquire about all of these jobs. I do not find Claimant's job search efforts constitute due diligence.

Accordingly, I find that Claimant became permanently partially disabled as of June 13, 2006, the date suitable alternative employment was established. Claimant does not dispute any compensation prior to this period. Suitable alternative employment at a wage of $8.00 an hour was identified on June 13, 2006.[19] Taking into account the increase in wages from Claimant's date of accident in 2004, I find Claimant's earning capacity to be $306.80.[20]

[19] Two of the three jobs identified paid $8.00 an hour.

[20] Since the June 23, 2004 injury the National Average Weekly Wage has increased from $515.39 to $536.82 in 2006, which equals a 4.158% increase. Reducing Claimant's $8.00 an hour earning capacity in 2006 by 4.158% equals $7.67 an hour times 40 hours a week equals $306.80.

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer shall pay to Claimant compensation for permanent partial disability from June 13, 2006 and continuing based on an average weekly wage of $673.85 and an earning capacity of $306.80;

(2) Employer shall pay for all section 7 medical expenses and shall pay for Claimant to see a physician of her choice to have her complaints of low back pain evaluated;

(3) Employer shall be entitled to a credit for all payments of compensation previously made to Claimant;

(4) Employer shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961;

(5) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have ten (10) days from receipt of the fee petition in which to file a response; and

(6) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

Entered this 17th day of August, 2007, at Covington, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge